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Elizabeth S. Scott

Columbia Law School, escott@law.columbia.edu

Ben Chen

bc2618@columbia.edu

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Fiduciary Principles in Family Law

Elizabeth S. Scott and Ben Chen

I. Introduction

Family members bear primary responsibility for the care of dependent and vulnerable individuals in our society, and therefore family relationships are infused with fiduciary obligation. Most importantly, the legal relationship between parents and their minor children is best understood as one that is regulated by fiduciary principles. Husbands and wives relate to one another as equals under contemporary law, but this relationship as well is subject to duties of care and loyalty when either spouse is in a condition of dependency. Finally, if an adult is severely intellectually disabled or becomes incapacitated and in need of a guardian, a family member is often preferred to serve in this role.

This chapter examines the application of fiduciary principles and doctrine to close family relationships. The chapter explains that the parent-child and spousal relationships are governed by fiduciary principles and duties, but that enforcement of these duties [at least when family relationships are intact] is largely accomplished through informal bonding and monitoring mechanisms. In contrast, when family members become guardians of adult relatives, fiduciary law applies with minimal recognition of the family bond and obligations are formally enforced. The chapter examines the rationales for these contrasting approaches and questions whether adjustments are indicated.

Our analysis focuses first on the regulation of intact family relationships. The relationship between parents and minor children fits intrinsically into a fiduciary framework.¹ Parents have the challenging responsibility of caring for their children over the period of their minority and of preparing them to become independent adults. Society has a critical stake in parents' successful performance of the many tasks that inhere in their role, and success is possible only if parents act to promote their children's interests. But the law usually assumes that the interests of parents and children are aligned, and it relies heavily on informal regulatory incentives and oversight with modest formal enforcement in intact families. In general, only when parents default seriously in

¹ The analysis of the parent-child relations draws on Elizabeth S. Scott & Robert E. Scott, Parents as Fiduciaries, 81 Va. L. Rev. 2401 (1995).

fulfilling their parental duties, or the family dissolves, is the parent-child relationship subject to formal enforcement. This approach aims, with relative success, to restrain parents from pursuing selfish interests, while protecting family privacy and motivating parents to provide the care needed by children. Spouses also have fiduciary obligations to one another, obligations that are in tension with the contemporary liberal model of marriage. Spousal duties of loyalty and care, even more than those of parents, are enforced informally in intact marriage; legal enforcement is limited to divorce and death. As with the parent-child relationship, greater use of formal enforcement during marriage seems unlikely to improve performance.

The law's approach changes dramatically when adult family members are incapacitated and in need of care. Appointed family guardians are typically parents (for intellectually-disabled adults) or adult children or spouses (for incapacitated elderly persons). In this setting, the legal presumption that close family members have aligned interests becomes attenuated. Regulators give some recognition to the family bond that is the basis of the guardianship, but often employ formal bonding and monitoring mechanisms in the form of conflict of interest rules and reporting requirements; these restrictions aim to prevent guardians generally from acting contrary to the interest of the incapacitated adult. In the context of close, ongoing relationships between the adult and her guardian, these burdens can sometimes be costly. The chapter concludes by suggesting that modest relaxation of formal fiduciary obligations in this context can sometimes serve the interests of the adult by supporting her relationship with the family guardian.

II. Parents as Fiduciaries

On first inspection, the description of parents as fiduciaries may seem inapt, given the deeply embedded deference to parental rights in American law.² Protection of parental rights continues to be robust, despite a shift in recent decades toward a regime that focuses more directly on children's welfare. Some contemporary critics view the rights of parents and the interests of children as inherently conflicting, and assume that children would benefit from greater state oversight of families and restrictions on parental authority.³ But this apparent conflict is much diminished if this legal relationship is analyzed in a fiduciary framework in which parents' duty to care for their children dominates and parental authority is contingent on

² See *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Troxel v. Granville*, 530 U.S. 57 (2000); *Yoder v. Wisconsin*, 406 U.S. 205 (1972).

³ See, e.g., Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 *Cardozo L. Rev.* 1747 (1993).

satisfactory fulfillment of essential parental obligations. In this framework, properly limited parental rights facilitate adequate performance by parents and serve the law's interest in promoting children's welfare.

Indeed, the parent-child relationship shares much in common with other fiduciary relationships, such as guardianships, trusts, and relationships between corporate directors and shareholders. Like other fiduciaries, parents are agents who hold asymmetric power and wield substantial discretionary authority in a relationship that aims to benefit the principal. And like other principals, children are vulnerable and not in a position to supervise or control parental performance. Here, as in other fiduciary contexts, the goal of legal regulation is to encourage the parent to serve the child's interest, and to do so under conditions in which monitoring is difficult.⁴

Some features of the parent-child relationship distinguish it from other fiduciary affiliations and pose particular challenges for legal regulation.⁵ This family relationship is broader in scope than are most other fiduciary bonds; parents must perform a wide range of tasks in many spheres that pervade their lives and those of their children. Moreover, intimate family relationships require privacy to flourish to a greater extent than do other fiduciary relationships. Thus, formal monitoring of parental performance can be costly. Further, unlike other fiduciaries, parents receive no compensation for fulfilling their duties; their reward comes from non-pecuniary role satisfaction. Finally, the parent-child relationship, once established, has intrinsic value for the child and is not readily replaced even if parental performance is suboptimal.

The law's effort to encourage satisfactory parental performance is shaped by these unique qualities, but it is implemented through mechanisms that are familiar in other fiduciary contexts. As agency theory explains, the law employs two means of reducing conflicts of interest between agents and principals. Bonding mechanisms encourage agents to align their interests with those of their principals, while monitoring mechanisms facilitate oversight of agents' behavior to detect selfishness or shirking.⁶ In a fiduciary framework, much regulation of the parent-child relationship can be understood as serving either bonding or monitoring functions, and both extra-legal and formal legal arrangements are used in various combinations to achieve regulatory

⁴ See Robert C. Clark, Agency Costs versus Fiduciary Duties, in *Principals and Agents: The Structure of Business* 55, 56-59, 77 (John W. Pratt & Richard J. Zeckhauser eds., 1985).

⁵ See discussion in Scott & Scott, *supra* note 1, 2402-03, 2430.

⁶ See Michael C. Jensen & William H. Meckling, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, 3 *J. Fin. Econ.* 305, 308 (1976).

goals. Extra-legal mechanisms predominate in the regulation of intact families. More costly and intrusive legal regulation is limited to situations in which parents seriously default or societal consensus dictates that parental discretion should be preempted through mandatory rules. But when the family is fractured, the assumption that parents usually act in their children's interest becomes weaker and formal legal constraints substitute for informal mechanisms.

A. Regulating Parents in Intact Families.

For the biological parent living with a child, fiduciary obligations begin at the child's birth, with no formal appointment or (typically) evaluation of whether the parent will be a suitable guardian who is capable of fulfilling the broad obligations of the parental role. (When a child is adopted, in contrast, a rigorous process determines the parent's suitability for parenthood.) The law generally presumes that legal parents will act in the child's best interest and adequately fulfill the many obligations that inhere in the role. Given the strong tradition of parental rights and the asymmetric nature of the parent-child relationship, this presumption may seem puzzling. Why are parents generally trusted to put their duty to their children above their selfish interests with far less state supervision than applies to other fiduciaries?

1. Extra-legal enforcement limiting conflicts of interest.

Due to two unique aspects of the parent-child relationship, most parents are effectively motivated to serve their children's interest through powerful extra-legal mechanisms that usually are far stronger than in other fiduciary contexts. First, in contrast to other fiduciaries, most parents love their children and want to promote their welfare; for many parents, the parental role is central to social and personal identity. This powerful affective bond is assumed to lead parents to fulfill duties of care and loyalty. Second, strong informal social norms regulate parental behavior more effectively than is possible in other fiduciary contexts. Courts generally conceptualize the fiduciary role as one infused with a sense of moral obligation that distinguishes fiduciaries from most commercial agents.⁷ In other contexts, this norm is largely a legal construction, but parental norms operate independently of law and are broadly enforced in society. Parents expect to receive approval from family, friends, and community for good parenting and informal sanctions (in the form of gossip or social exclusion) if they default. Good-parenting norms are internalized by parents, who predictably will experience feelings of

⁷ Clark, *supra* note 4, 75-76.

guilt for shirking or selfish behavior.⁸ Thus the affective ties that define the parent-child relationship, together with informal social norms, serve extra-legal bonding and monitoring functions that align interests of parents and children; these mechanisms are relatively effective and also less costly to enforce than legal regulation.

Informal monitoring and bonding mechanisms also avoid costs that render legal enforcement particularly burdensome in this context. Parental discretionary authority and family privacy are critically important to promote flourishing family relationships. In contrast to fiduciaries in many other contexts, who focus on a narrow range of financial decisions, parents make a broad range of complex decisions affecting every aspect of their children's lives. Moreover, the interests of parents and children are inevitably intertwined; many decisions affect parents as well as children. Thus, a strict conflict of interest rule prohibiting self-interested choices by parents would be unmanageable. The law recognizes that parents need substantial discretion to perform their role, and effectively accords parents in (most) intact families a presumption of good faith and due diligence.⁹ The law also presumes that parents can cooperate and resolve disputes about decisions affecting their children without state intervention. This deferential approach is analogous to the business judgment rule governing corporate directors and managers, who similarly perform a broad range of tasks and require substantial discretion to fulfill their fiduciary duties.¹⁰ As such, it might be described as a "parental judgment" standard.

Deference to parental judgment is important for another reason as well. Parents receive no compensation for their services; their reward comes in the form of non-pecuniary role satisfaction. Much of this satisfaction is intrinsically derived from the rewarding nature of the relationship itself, but legal and societal deference and respect for the important function parents serve also contribute to role satisfaction. Onerous burdens or intrusive state oversight through elaborate reporting requirements would likely undermine the satisfaction parents derive from a

⁸ For a discussion of parenting norms, Scott & Scott, *supra* note 1.

⁹ Readers of this chapter have pointed out (correctly) that the regime of informal enforcement and deference to parental judgment is not applied evenhandedly across social classes. Poor families are often subject to more state oversight and intervention than other families, and their parenting judgment often receives much less deference. At the same time, critics argue that the state fails to provide these families with the support needed to promote children's welfare. See Clare Huntington, *Failure to Flourish: How Law Undermines Family Relationships* (2014).

Moreover, due to a lack of substantial estates, poor families may have neither the need nor the means to pay for professional guardianship services. See *infra* Part III.C. Family members therefore shoulder the burden of providing guardianship services, and they owe formal fiduciary duties even when they do not receive financial compensation. See *infra* Part III.D.

¹⁰ Scott & Scott, *supra* note 1, 2437-38.

role that requires substantial dedication. Given the assumption that strict supervision is usually unnecessary to induce satisfactory performance, parents are given substantial freedom to raise their children according to their own values so long as the child's welfare is not threatened.

2. Legal enforcement of parents' fiduciary duties.

Of course, extra-legal mechanisms are not always adequate to encourage parents to act to promote their children's interests. To mitigate conflicts of interest, legal mechanisms restricting parental discretion are invoked in two situations. First, the state will intervene under its abuse/neglect jurisdiction if parents seriously default on their duties to care for their children. Second, preemptive legal rules limit parental authority when a societal consensus dictates that violation of the rule potentially harms children and undermines social welfare. Under both conditions, the prohibited parental conduct or decision is deemed unreasonable and beyond the broad authority afforded by the parental judgment rule.

Parental neglect or maltreatment demonstrates that the informal controls encouraging parents to prioritize the child's interest have failed. At that point, the state steps in, subjecting parents to formal oversight and restricting their authority. Given the privacy of family relationships, detection and monitoring of parental neglect or maltreatment pose challenges.¹¹ Detection is implemented through child-abuse reporting statutes in every state, which monitor families by imposing a duty to report suspected child abuse on professionals who interact with children, such as physicians, teachers, child care workers, and therapists.¹² Reporting by non-professionals is facilitated as well; neighbors and community members can report suspected maltreatment to state social services agencies, triggering an investigation. If neglect or abuse is established, parental authority is restricted; the parent is subject to state supervision and monitoring and may be directed to participate in programs to promote improved parenting.

Narrow statutory enactments also preempt parental authority under the state's police power, regulating parental behavior in several domains to protect children's health and safety and assure that they receive sufficient education to become productive adults. Categorical restrictions on parental authority include compulsory school attendance laws, curfew laws, child labor prohibitions, vaccination requirements, and minimum age restrictions on driving and drinking alcoholic beverages. These rules represent a societal consensus that children's welfare

¹¹ Poor families enjoy less privacy due to greater involvement of state agents in poor communities to facilitate state intervention.

¹² See, e.g., Cal. Pen. Code § 11,166 (West 2017).

demands conformity to the prescribed directive and that a contrary choice by parents is an unreasonable exercise of discretion and a breach of parental obligation. Preemptive rules embody a legislative judgment about the limits of reasonable parental discretion and about necessary conditions for children's healthy development.

3. The function of parental rights.

Family law's robust protection of parental rights can be incorporated into a fiduciary framework to a substantial extent. In a regime that offers no financial compensation for the fulfillment of parental responsibilities, parental rights are offered as a *quid pro quo* for satisfactory performance. Parental rights are conferred *ex ante*, embodied in parents' discretionary authority and supported by the presumption of good faith and due diligence. These rights are limited by rules preempting parental authority and they can be withdrawn if parents seriously default. Parental rights in some form are a necessary element of a regime that aims to encourage parents' best efforts to pursue their children's interests.

Excessive emphasis on parental rights as the lynchpin of the parent-child relationship carries costs, however. "Rights talk" can undermine the law's goals by potentially weakening the normative signals associated with parental responsibility.¹³ Further, the rhetoric of parental rights encourages parents to consider their own selfish interests rather than those of their children, and thus increases the potential for conflicts of interest. Moreover, the tendency to balance parental rights *against* child welfare undermines the aim of aligning parents' interests with those of their children. In recent years, a reformulation of legal rhetoric has ameliorated these negative effects by focusing on parental obligations and by underscoring the critical link between parental rights and responsibilities. Correctly understood, parental rights embody the respect and discretion needed to fulfill this important societal role.

i. Regulating parents outside the intact family.

Regulation of non-custodial parents and their children extends to a diverse set of family relationships: these include divorced or separated parents; parents who have lost custody due to abuse and neglect; and parents (usually unmarried fathers) who have never lived with their children. It may seem curious to classify these parents as fiduciaries at all; non-custodial parents generally perform a limited caretaking role and those who have lost custody to the state have demonstrated severe inadequacy in fulfilling their obligations. But if the parent and child have an

¹³ See Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* 76-101 (1991).

established bond, the relationship usually warrants legal protection because it very likely has substantial intrinsic value to the child. Thus, although non-custodial parents have fewer obligations and more limited discretionary authority, the law has an interest in encouraging these parents to fulfill their obligations and to act in their children's interests.

In achieving this goal, formal legal monitoring and bonding mechanisms often supplant the extra-legal mechanisms that predominate in regulating parents in intact families. A non-custodial parent may have weaker bonds with the child than do parents and children in intact families, and thus may be less motivated to prioritize the child's welfare. The relationship rewards are often reduced, along with parent's legal authority. Further, non-custodial parents may not be a part of the child's community, reducing the effectiveness of informal social norms in regulating parental behavior. Finally, parents' ability to cooperate with each other and resolve disputes informally is no longer assumed. Under these conditions, non-custodial parents may be inclined to pursue selfish ends that conflict with the child's interest, and legal enforcement mechanisms may substitute for affective bonds and informal social norms to assure the fulfillment of parental duties.

An example demonstrates this point. All parents have the obligation to provide for their children's needs with financial support. In intact families, the duty is not legally enforced. It is assumed that parents and children's interests are aligned and that informal norms will motivate parents to fulfill this obligation. Upon divorce, however (or when a parent has never lived with the child, in the case of the unmarried father), the non-custodial parent is subject to a formal child support order enforced through legal sanctions.¹⁴ Substantial evidence supports the need for formal enforcement, indicating that these parents are less effectively influenced by informal social norms to voluntarily provide financial support.

Legal efforts to encourage non-custodial parents to fulfill their fiduciary duties include a combination of sticks and carrots. To encourage satisfactory performance, divorced parents and those with children in state custody are subject to more extensive state supervision and monitoring than parents in intact families. When parents divorce, a court order dictates custody arrangements, allocating time with the child, financial support, and specific duties to provide services needed by the child (school tuition payments, for example). Parents whose children are

¹⁴ See, e.g., Mass. Gen. Laws Ann. ch. 119A, § 16 (West 2017) (enabling deprivation of licenses for failure to pay child support).

in state custody are subject to intensive supervision requiring them to remediate the behavior and conditions that led to the child's removal from their custody. Child protective service agencies oversee parent-child interaction and monitor compliance with the requirements of the foster care plan.¹⁵ Progress is subject to periodic judicial review, and failure to remediate can result in termination of parental rights.

Non-custodial parents are also encouraged to fulfill parental duties through legal responses that seek to reward their efforts and enhance role satisfaction. Three examples make this point. First, in many states, shared legal custody is the preferred arrangement for divorced or separated parents. Shared custody signals that both parents enjoy and deserve full parental status with attendant rights and responsibilities.¹⁶ The arrangement avoids disenfranchisement of non-custodial parents, and also presumably avoids the parent's disengagement from the parent-child relationship that often followed under traditional custody law. Second, parents who have lost custody to the state continue to have contact with their children in foster care and can regain custody through effective remedial efforts. Finally, non-custodial parents cannot lose parental rights so long as they fulfill their parental obligations and maintain a relationship with the child. Even unmarried parents who have never lived with their children can retain their parental status through efforts to establish a relationship and assume parental responsibilities.¹⁷ Thus, the legal conception of *reciprocal* parental rights and responsibilities operates in the regulation of non-custodial parents as well as parents in intact families.

ii. Termination of parental rights.

In most fiduciary contexts, a serious violation of the duty of care or loyalty results in dismissal and replacement with a new un-conflicted fiduciary. In the family context, however, the relationship with a parent is assumed to have intrinsic value to the child. Outside the context of adoption, parents cannot easily abandon their responsibilities, nor can the state readily sever the bond and substitute a new parent. Because parents are not fungible, termination of parental rights is deemed an extreme measure, even when the parent has defaulted on his or her duties. Thus, the termination decision is subject to substantive and procedural requirements that

¹⁵ See, e.g., Cal. Pen. Code § 11,166(k) (West 2017).

¹⁶ See, e.g., Cal. Fam. Code § 3020(b) (West 2017).

¹⁷ This principle is established in several Supreme Court opinions dealing with rights of unmarried fathers. *Lehr v. Robertson*, 463 U.S. 248, 262 (1983); *Caban v. Mohammed*, 441 U.S. 380, 392 (1979).

recognize the importance of the relationship to both parents and child.¹⁸ This response is appropriate if parents are likely to assume parental responsibilities in a reasonable time or if maintaining the relationship with even a deficient parent has value for the child. But obstacles to termination should not be driven primarily by a rigid deference to parental rights. If the likelihood that parents can resume responsibilities is remote, the child's interest may be promoted by termination, along with the assumption of parental duties by another adult who will act with due diligence to provide care.

III. Spouses and Intimate Partners

Fiduciary principles are applied more sparingly to the regulation of other family relationships than to the relationship of parent and child. Informal social norms establish a duty of loyalty and care between spouses that likely motivates each spouse to prioritize the other's interest, but legal enforcement of the duty to care for a dependent spouse or to avoid self-dealing is limited to the context of divorce or death. To some extent, the contemporary liberal model of marriage has eroded fiduciary principles, insisting that spouses have few responsibilities to one another. Under modern law, legal protection of vulnerable or dependent spouses arises in the regulation of spousal support and distribution of marital property on divorce and in the spousal right to an elective forced share at death. Also, the common law necessities doctrine and the testamentary marital privilege could also be seen as grounded in a duty of loyalty.¹⁹ But in the era of no-fault divorce, other sanctions for breach of marital obligations are few. Unmarried intimate partners may undertake contractual duties to one another, but otherwise have no special obligations to care for each other's dependency needs.

A. Liberal marriage and fiduciary obligation.

Through the exchange of marriage vows, spouses promise loyalty and mutual care "in sickness and in health," and in an idealized form, each spouse prioritizes the other's interest above selfish concerns. Moreover, powerful social norms motivate spouses to care for one another during periods of dependency, such as childbirth, illness, and old age. Not surprisingly, when an elderly person becomes incapacitated and needs a guardian, a competent spouse is likely to be appointed. Indeed, the role of spouses in caring for each other's dependency needs and relieving society of that burden is one justification for the privileged legal status of

¹⁸ *Santosky v. Kramer*, 455 U.S. 745, 768-70 (1982).

¹⁹ *In re Grand Jury Investigation*, 603 F.2d 786, 789 (9th Cir. 1979) (Witness claiming marital privilege "should not be compelled to choose among perjury, contempt, or disloyalty to a spouse").

marriage.²⁰ However, under contemporary law, spouses are free to divorce for self-interested reasons, with no direct sanctions for violations of the duties of care and loyalty.

Liberal marriage has replaced a traditional model that may appear to have fit more comfortably in a fiduciary framework. Under traditional law, for example, violations of the duty of loyalty (adultery, cruelty) and duty of care (desertion) were grounds for divorce. Moreover, the wife, like the principal in fiduciary relationships, was dependent, vulnerable, and presumed to be incapable of acting in furtherance of her own interests; the husband was financially responsible for his wife's care and authorized to make decisions affecting her welfare. But husbands were not encouraged to prioritize the interests of their wives over their own interest. To the contrary, the wife's identity and interest were subsumed upon marriage into that of the husband, and her legal status was subordinate to his. According to the adage, "The husband and wife are one and the husband is the one."²¹

The modern legal framework thoroughly rejects this hierarchy, and legal doctrines have been reformed to embrace a strong spousal equality principle. Further, in elevating wives from their former subordinated status, modern reforms have tended to make individual autonomy a core principle in defining the spousal relationship. This model is far more compatible with contemporary values than its predecessor, but the primacy of autonomy as a defining principle has not been wholly satisfactory in marriage regulation. Although fiduciary principles play a role in regulating marriage, the liberal model does not emphasize mutual responsibility and only modestly reinforces social norms of spousal care and loyalty. The law of property distribution and spousal support provide some protection of dependent spouses on divorce, but dependency grounded in marital roles is presumed to create only limited obligation in the other spouse.

B. The necessities doctrine and conflicting principles.

Recent reforms of the common law necessities doctrine capture the challenge lawmakers face in modernizing marriage law to conform to contemporary values. At common law, husbands were liable to third parties for expenses incurred by their wives for necessities, a category that includes food, clothing, medical treatment, and shelter. Liability was based on the husband's obligation to provide financial support to his wife. Modern courts, applying the equality principle, have been required to determine whether to abolish the doctrine, absolving

²⁰ Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. Chi. Legal F. 225, 229-30.

²¹ See 1 William Blackstone, *Commentaries on the Laws of England* 442-45 (1765).

both spouses of liability, or to extend liability for necessities to both spouses. Courts favoring abolition implicitly embrace the liberal model of marriage, viewing the spouses as independent agents with few special obligations to one another, even for basic needs.²² Courts extending liability for necessities to wives view marriage as a relationship of mutual obligation in which each spouse has a duty to care for the other and provide for basic needs.²³ Implicit in this choice is a judgment about the extent to which fiduciary principles apply to marriage.

C. Marital property and spousal support.

Fiduciary principles influence the ownership of property during marriage in some states, and property distribution on divorce in most jurisdictions. In community property states, marriage is a partnership in which homemaker and earning spouses are presumed to contribute equally. All property acquired during marriage belongs to the marital community, and an individual spouse managing community property acts as a fiduciary for the community and not as a self-interested party. When a couple divorces, community property is divided between them.²⁴ In former common-law property states, spouses can hold title to, manage, and transfer property as individuals during marriage, but at the time of divorce, property acquired during marriage becomes marital property to be divided equitably (although not necessarily equally) between the spouses.²⁵ Both regimes value spouses' non-monetary contributions to the marriage, recognizing the vulnerability of financially dependent spouses and offering protection.

Divorce law recognizes that social norms promoting care, loyalty, and cooperation during marriage erode when the marriage dissolves and spouses no longer share aligned interests. Conflict of interest rules seek to deter selfish behavior. Even in common law states, spouses have a duty to disclose all assets prior to divorce so that the court can accurately determine the fair distribution of property. Moreover, although spouses generally are free to spend and transfer assets during marriage, dissipation of assets in contemplation of divorce by one spouse will be sanctioned by the court in distributing property.²⁶ Interestingly, divorcing spouses are presumed to be bound by a duty of loyalty derived from the marriage, despite the reality that both are usually motivated by self-interest and understand that their interests are in conflict. In contrast, a couple executing a premarital contract are assumed to be negotiating at arms-length, although

²² *N. Ottawa Cmty. Hosp. v. Kieft*, 578 N.W.2d 267 (Mich. 1998).

²³ *North Carolina Baptist Hosps., Inc. v. Harris*, 354 S.E.2d 471, 472-74 (N.C. 1987).

²⁴ See, e.g., Cal. Fam. Code § 2550 (West 2017).

²⁵ See, e.g., Pa. Stat. and Cons. Stat. Ann. § 3502 (West 2017).

²⁶ Restatement (Second) of Property: Donative Transfers § 34.1 (Am. Law Inst. 1992).

one party is often unrepresented by counsel and unaware that the other may aim to protect his or her self-interest. Courts have held that before marriage, engaged parties have no fiduciary duties to one another.²⁷

In many marriages, spouses assume specialized roles that leave the homemaker spouse financially vulnerable on divorce. In this situation, the earning spouse can be subject to a legal spousal support order post-divorce until the dependent spouse attains financial self-sufficiency. This order formalizes the obligation that the earning spouse presumably undertook willingly during marriage when the parties' interests were aligned. After divorce, legal enforcement is required to assure that the obligation is fulfilled and to prevent selfish behavior. The duration and amount of spousal support depends on the payor spouse's earnings, and also on the length of the marriage and the dependent spouse's prospects for self-sufficiency. The obligation may extend indefinitely if the dependent spouse has become disabled during the marriage or has dim prospects for employment after a long marriage due to age. This obligation is based on a fiduciary duty of care grounded in the marriage relationship. But these cases are increasingly rare. Under the liberal model of marriage, divorce represents a clean break that promises each spouse the freedom to pursue personal goals. Modern courts are reluctant to recognize ongoing post-divorce obligations grounded in past marital roles. Short-term alimony has become the legal norm, with the expectation that dependent spouses can attain self-sufficiency relatively quickly.²⁸ As many scholars have recognized, this approach systematically disadvantages homemakers in long-term marriages.²⁹ The implicit promise of financial support when the spouses assumed differentiated marital roles is subject to limited legal enforcement.

D. Unmarried partners.

An unmarried cohabiting couple can contract to assume mutual obligations that afford financial protection to a vulnerable partner when the relationship ends.³⁰ Such contracts can provide for property sharing and ongoing financial support for a dependent partner. In many states, both express contracts and contracts implied in fact can be enforced, although determining promissory conduct often proves difficult.³¹ But unmarried partners have no fiduciary obligations

²⁷ *In re Marriage of Bonds*, 5 P.3d 815, 831 (Cal. 2000); *Mallen v. Mallen*, 622 S.E.2d 812, 815 (Ga. 2005); *Blige v. Blige*, 656 S.E.2d 822, 827 (Ga. 2008).

²⁸ See, e.g., *Hughes v. Hughes*, 869 P.2d 198, 199-200 (Ariz. Ct. App. 1993) (citations omitted).

²⁹ Emily Stolzenberg, *The New Family Freedom*, 59 B.C. L. Rev. (2018).

³⁰ *Marvin v. Marvin*, 557 P.2d 106, 110-16 (Cal. 1976).

³¹ See Scott, *supra* note 20.

derived from their intimate relationship, even one of long duration. In the absence of contract, no legal basis exists to impose fiduciary duties on one partner for the benefit of the other. Indeed, the choice not to marry is taken to represent a choice not to be bound by legally enforceable relationship duties, even in long-term marriage-like unions.³²

IV. Family Guardianships: The Formalization of Fiduciary Duties

When an adult is unable to care for herself or make self-interested decisions due to cognitive incapacity or other causes, a court may appoint a legal guardian to manage her person or estate if her needs cannot be met by less restrictive alternatives.³³ The relationship between an adult subject to guardianship and her guardian is a prototypical fiduciary relationship: legal regulation aims to protect a vulnerable and dependent individual who is presumed unable to assert her own interests from overreaching and self-dealing by the guardian. To accomplish this end and enforce the duties of care and loyalty, guardians, like other fiduciaries, ordinarily are subject to state oversight in the form of extensive reporting and accounting obligations. **See Chapter 2.** Courts also often apply strict conflict of interest rules to regulate guardians, especially those who manage estates. This part examines the regulation of family guardians, focusing on surrogacy law's very different treatment of these relationships from the law's response in other family contexts.

A. The Need for Special Protections in Formal Fiduciary Relationships

Surrogacy law recognizes close family bonds in the appointment of guardians; often the preferred guardian is a spouse or an adult child of an elderly parent, who presumably shares an intimate family relationship with the individual.³⁴ But family guardianships are not subject to the presumed alignment of interests that the relationship between parents and minor children and (competent) spouses enjoy. Although the relational bond receives some recognition under surrogacy law, family guardians largely are subject to the same restrictive regulatory framework as other guardians. Unlike a typical parent of a minor child, a family guardian owes legally enforceable fiduciary duties – including extensive accounting and reporting duties and the duty

³² See, e.g., *Friedman v. Friedman*, 24 Cal.Rptr.2d 892, 894, 898-99 (Cal. Ct. App. 1993).

³³ For simplicity, we use “guardian” to denote guardian of person or of estate. Some statutes call a guardian of estate a “conservator”. **See Chapter 2.**

³⁴ See, e.g., Admin. Conf. U.S., SSA Representative Payee: Survey of State Guardianship Laws and Court Practices 16 (Dec. 24, 2014), <https://www.acus.gov/report/ssa-representative-payee-survey-state-guardianship-laws-and-court-practices>.

to avoid substantial conflicts of interest.³⁵ Procedures enabling prior judicial authorization of transactions that benefit the guardian provide partial accommodation of family relationships in many states, but family guardians who lack the sophistication to follow these procedures may violate fiduciary duties at great cost to themselves and to their relationships with their dependents.

While many parents and children retain a close emotional bond for their mutual lives, extra-legal mechanisms deterring selfish behavior are deemed inadequate when a family member (including a child) is appointed guardian for an adult. This response derives from differences between incapacitated adults and minor children, and from presumed differences between these family relationships and those of parent and minor child. Adult children usually no longer live with their parents and have their own interests and concerns, including their own nuclear families. Moreover, unlike the typical parent of a minor child, the guardian may have an expectation of financial gain on the death of the incapacitated family member that creates a potential conflict of interest in the expenditure of guardianship assets. Informal monitoring of the guardian's care may be difficult in this setting as the protected adult may have less contact with professionals than would a minor child. Further, the potential for conflict among adult siblings about a parent's care may be less subject to informal resolution than disagreements between parents or spouses in intact families.

Another consideration also weighs against giving broad discretionary authority to the guardian of an adult. Unlike a child, an elderly person typically has lived a life in which she has acquired a stable identity with established values and preferences. She has an interest in self-determination that she is not able to realize personally. Thus, the guardian's role, to the extent possible, is to make decisions consistent with the elderly person's self-defined interest, a constraint that appropriately limits the guardian's authority. Relatedly, an adult subject to guardianship has a dignitary interest in personhood that exists only in nascent form in childhood. This interest warrants respect, and it is threatened when another person assumes decision-making authority over important aspects of the individual's life. In sum, the state's interest in deterring selfish behavior by the family guardian is substantial, and this relationship may be less amenable

³⁵ See, e.g., Unif. Guardianship, Conservatorship, and Other Protective Arrangements Act § 425 (Unif. Law Comm'n 2017) (Unauthorized transactions that are affected by "a substantial conflict between the conservator's fiduciary duties and personal interests is voidable[.]"). See generally *infra* Part III.D.2.

to regulation through extra-legal bonding and monitoring mechanisms than the parent-(minor) child relationship.

These considerations warrant vigilance to avoid conflicts of interest by the guardian in many cases, but may impose undue burdens on the parties in some family guardianships. Many incapacitated individuals are in close relationships with their family guardians, with a long history of care by the guardian and intertwined interests, including the sharing of resources. In this situation, the rigid imposition of conflict of interest rules can result in outcomes that may clash with the interest and preferences of the protected adult, based on her past choices. A presumption of good faith and due diligence might be appropriate in these cases, together with the careful application of a substituted judgment standard to evaluate apparent conflicts.

B. Appointment.

In most states, a close family member is preferred over other potential guardians and,³⁶ in some, spouses and children are preferred over other relatives.³⁷ This reflects an appreciation for the importance of family bonds and an assumption that these bonds will reduce self-interested behavior by the guardian. But courts have broad discretion in appointing a guardian, and often no legal presumption favoring family members constrains the court's decision.³⁸ Courts choose non-family guardians in several situations. If the individual herself objects to the petitioner or family members seriously disagree about the appointment, a neutral outsider may be appointed.³⁹ The latter conflict sometimes arises when children of an elderly person object to a sibling's or spouse's appointment. In other cases, the petitioner may lack the expertise to manage substantial or complex estates, leading to the appointment of a professional guardian.⁴⁰ The family petitioner may be a distant relative who lacks close bonds with the incapacitated adult; in this case, no special preference seems warranted.

These seem like sound reasons for rejecting a family petitioner, but courts sometimes decline to appoint a close family member simply because she has an expectation of inheritance (especially if other potential heirs object), on the ground that this creates a potential conflict of

³⁶ See, e.g., *Matter of Gollaher*, 724 S.W.2d 597, 601 (Mo. Ct. App. 1986).

³⁷ See, e.g., *Unif. Guardianship, Conservatorship, and Other Protective Arrangements Act* §§ 309, 410 (Unif. Law Comm'n 2017).

³⁸ See, e.g., *In re Tammy J.*, 270 P.3d 805, 809-11 (Alaska 2012).

³⁹ *Id.* at 808-11.

⁴⁰ See, e.g., *In re Guardianship of R.G.*, 879 N.W.2d 416 (N.D. 2016). See generally Alison Barnes, *The Virtues of Corporate and Professional Guardians*, 31 *Stetson L. Rev.* 941, 949-50 (2002).

interest.⁴¹ Some states go further to disqualify any relative who does not renounce her pre-existing interests in the guardianship estate.⁴² This response discounts the likely value to the protected adult of a close family relationship with the guardian and ignores her preferences expressed before she became incapacitated. In some cases, ignoring the relational bond between spouses, siblings, or parent and child may result in the appointment of a neutral, but sub-optimal, guardian, not motivated by affective bonds to exercise due diligence and act in the interest of the adult subject to guardianship.⁴³

The appointment of a guardian severely curtails the individual's personal autonomy and therefore directly implicates her liberty interest. For this reason, the appointment proceeding is subject to rigorous due process requirements; these are discussed **in Chapter 9**. Thus, even if the petitioner is a spouse or adult child who has cared for (and even lived with) the incapacitated person, due process protections apply to the decision of whether she is so incapacitated that a guardianship is needed and, if so, what is the extent of that incapacity. But once this determination is made, a presumption favoring a close family member as guardian, so long as the incapacitated adult is amenable, would often seem to be in her interest.

C. Compensation.

Guardianship statutes typically allow a family guardian, like other guardians, to receive reasonable compensation for her services from the guardianship estate.⁴⁴ Allowing the family guardian to receive compensation (to the extent permitted by the value of guardianship estate) formalizes the guardianship relationship. This indicates that lawmakers deem the relationship rewards and extra-legal enforcement mechanisms that operate effectively in the context of the parent-child relationship to be insufficient to induce the guardian to faithfully perform her duties with due diligence. As in other formal fiduciary contexts, financial compensation is deemed

⁴¹ See, e.g., *In re Caryl S.S.*, 15 N.Y.S.3d 710 (N.Y. Super. Ct. Mar. 23, 2015) (unreported).

⁴² For example, in *Moore v. Self*, the court found that the daughter – guardian to her elderly mother – had breached a fiduciary duty by applying for and accepting the guardianship after the parties had acquired properties as joint tenants with rights of survivorship. Despite finding no wrongdoing by the daughter-guardian, the court ruled for the deceased's sons, who sought to recover these properties to the deceased's estate. 473 S.E.2d 507, 508 (Ga. Ct. App. 1996).

⁴³ For example, in a New York case, the petitioner was the only sibling of L.M. – the adult subject to guardianship – and the trustee of two trusts for the benefit of the L.M.. The petitioner's children were to receive the remainder of the trusts upon the death of L.M. and saw these trusts as their inheritance. Finding that the petitioner had incentives to preserve the trusts for his children rather than provide for L.M., the court appointed a neutral attorney as guardian. *In re A.M.*, 930 N.Y.S.2d 173 (N.Y. Sup. Ct. 2011) (unreported).

⁴⁴ See, e.g., *Unif. Guardianship, Conservatorship, and Other Protective Arrangements Act* § 120 (Unif. Law Comm'n 2017).

necessary to encourage diligent performance and inculcates seriousness about the responsibilities of the role.⁴⁵ Unlike professional guardians, however, family guardians often do not ask for or receive compensation, suggesting that they understand the relationship to be grounded in family bonds.⁴⁶

D. Scope of Powers and Limits.

Once appointed, all guardians, including family members, are subject to a complex regime of legal regulations made up of formal bonding and monitoring regulations that aim to reduce self-interested behavior and shirking and to promote due diligence. A family guardian owes formal fiduciary duties of loyalty and care⁴⁷ and is also subject to accounting and reporting duties to which all guardians are subject. Further, she can be subject to the same sanctions for a breach of duty as other guardians, including restitution of property or funds acquired in breach of duty⁴⁸ or removal from office.⁴⁹

1. Monitoring.

Family guardians are subject to state monitoring similar to the regime that protects children from parental default. Adult protective service statutes in most states establish a system of reporting, investigation, and intervention designed to protect vulnerable elderly and disabled individuals (whether or not they are in a formal guardianship) from abuse or neglect.⁵⁰ These statutes often require professionals such as physicians to report guardians suspected of abuse or neglect.⁵¹ But even with no indication of misconduct, the monitoring of guardians, even close family members, is far more extensive than the oversight of parents. Guardianship statutes typically require the filing of detailed reports shortly after appointment, periodically for the duration of the guardianship, and when the guardianship terminates.⁵² See Chapter __. While these requirements can be fulfilled easily by professional guardians, family guardians often complain

⁴⁵ Paul S. Appelbaum & Thomas G. Gutheil, *Clinical Handbook of Psychiatry & the Law* 206 (4th ed. 2007).

⁴⁶ Barnes, *supra* note 40, at 954.

⁴⁷ See, e.g., Unif. Guardianship, Conservatorship, and Other Protective Arrangements Act §§313(c), 418(a) (Unif. Law Comm'n 2017).

⁴⁸ See, e.g., *Smallwood v. Lupoli*, 968 N.Y.S.2d 515, 517-18 (N.Y. App. Div. 2013).

⁴⁹ See, e.g., *In re Helen S.*, 13 N.Y.S.3d 516, 517 (N.Y. App. Div. 2015).

⁵⁰ Lawrence A. Frolik & Alison Barnes, *Elder Law: Cases and Materials* 516 (6th ed. 2015).

⁵¹ *Id.* at 525-26; Am. Bar Ass'n Comm'n Law & Aging, Reporting Requirements: Provisions and Citations in Adult Protective Services Laws, by State, http://www.americanbar.org/content/dam/aba/administrative/law_aging/MandatoryReportingProvisionsChart.authcheckdam.pdf (last visited May 10, 2017).

⁵² Am. Bar Ass'n Comm'n Law & Aging, Monitoring Following Guardianship Proceedings, http://www.americanbar.org/content/dam/aba/administrative/law_aging/chartmonitoring.authcheckdam.pdf (last visited May 10, 2017).

about the time and costs of compliance.⁵³ In part, extensive state monitoring requirements reflect concerns for the protected person's autonomy interest.⁵⁴ But these requirements also indicate a view that guardians require extensive oversight to prevent self-interested behavior or shirking, and that these concerns are as salient for family guardians as for others. Implicitly, the adoption of demanding reporting requirements indicates that the less costly extra-legal mechanisms that regulate the parent-child relationship are deemed inadequate to reduce perverse incentives.

2. Conflict of Interest Rules.

Courts often apply strict conflict of interest rules to prohibit guardians from acting other than in the sole interest of the protected person. The common law of most states also presumes that a self-dealing transaction between the guardian and the incapacitated individual is the result of undue influence by the guardian.⁵⁵ These rules usually function well to deter selfish behavior, but in cases involving close family relationships, strict enforcement can ignore intertwined financial interests and violate the wishes and preferences of the adult subject to guardianship, as indicated by her acts and decisions before incapacitation. Courts have considered whether incapacity vitiates prior understandings; some courts have relaxed these rules to accommodate pre-appointment understandings or practices between family members, while others have felt bound by prohibitions against self-dealing by the guardian, despite evidence that the incapacitated individual likely would have approved the transaction.

A comparison of two cases illustrates competing views of whether conflict of interest rules can be flexibly applied in the family context. In *Fielder v. Howell*,⁵⁶ the guardian cashed in a certificate of deposit held in joint tenancy with her husband and her incapacitated mother, acquired long before the guardianship. The Kansas court declined to find a breach of duty, rejecting the claim by the guardian's brother that the funds should be recovered by their mother's estate. In rejecting the conflict of interest claim, the court pointed to the guardian's (and her husband's) pre-appointment survivor rights to those proceeds, her spending of proceeds on her mother, and her preservation of her mother's other properties. In contrast, a Nebraska case illustrates an inflexible application of the no-conflict rules.⁵⁷ In *Conservatorship of Hanson*, the

⁵³ Brenda K. Uekert, Adult Guardianship Court Data and Issues: Results from an Online Survey 18 (2010).

⁵⁴ *In re Mark C.H.*, 906 N.Y.S.2d 419, 429-40 (N.Y. Surr. Ct. 2010).

⁵⁵ Restatement (Third) of Prop.: Wills and Donative Transfers § 8.3, cmt. f (Am. Law Inst. 1999) (citations omitted); Robert H. Sitkoff & Jesse Dukeminier, Wills, Trusts, and Estates 289-90 (10th ed. 2017).

⁵⁶ *Fielder v. Howell*, 631 P.2d 249 (Kan. Ct. App. 1981).

⁵⁷ *In re Conservatorship of Hanson*, 682 N.W.2d 207 (Neb. 2004).

protected adult and his wife (both in second marriages) agreed years before the guardianship was created that he would reimburse her monthly for the added expense of his living in her home. After he became incapacitated, his wife (now guardian) continued to receive payments until he died, without prior judicial authorization.⁵⁸ After the husband's death, his children from his first marriage sought to recover the payments received during the period of guardianship.⁵⁹ The court held the wife-guardian liable on the basis of self-dealing, and disgorged those payments from her.⁶⁰ In so ruling, the court attributed no relevance to "family financial management in the family's accustomed manner" or a lack of any sinister motive on the part of the wife-guardian.⁶¹

The doctrine of substituted judgment and its modern statutory variations offer some accommodation of past understandings between the incapacitated adult and her guardian by seeking to effectuate the likely preferences of the adult when she was competent. See Chapter 1. Under this doctrine, a guardian can seek prior judicial authorization of a transaction that violates the conflict of interest prohibition but represents the incapacitated individual's wishes or past practices,⁶² such as a gift to the family guardian or another relative or an expenditure of the guardianship funds for the mutual benefit of the adult and her guardian.⁶³ The substituted-judgment doctrine provides procedures for the family guardian to legitimize the transaction *ex ante* and for the court to evaluate evidence of past practices or expression of preferences, as well as the impact of the transaction.⁶⁴ But the statutory requirement of *prior* authorization may invalidate any unauthorized transactions, although family guardians (such as Ms. Hanson,⁶⁵ *supra*) may be unaware of their obligation to get court approval for what likely seems like a routine transaction. Perhaps for this reason, some courts allow guardians to defend unauthorized transactions *ex post*.⁶⁶

The imposition of burdensome reporting requirements and strict conflict of interest rules on family guardians is often justified by features of this fiduciary relationship that distinguish it from that of parents and children. But when a history of intimacy and harmony has characterized

⁵⁸ Id. at 209.

⁵⁹ Id.

⁶⁰ Id. at 211-12.

⁶¹ Id. at 211.

⁶² See, e.g., Unif. Guardianship, Conservatorship, and Other Protective Arrangements Act §§ 414, 425 (Unif. Law Comm'n 2017).

⁶³ See generally Lawrence A. Frolik, Is a Guardian the Alter Ego of the Ward?, 37 Stetson L. Rev. 53, 77-83 (2007).

⁶⁴ Some courts simply evaluate the ward's best interest. Id.

⁶⁵ *In re Conservatorship of Hanson*, 682 N.W.2d 207 (Neb. 2004).

⁶⁶ See, e.g., *Mullins v. Ratcliff*, 515 So.2d 1183, 1192-94 (Miss. 1987).

the family relationship, strict enforcement and reluctance to allow family guardians to act on pre-appointment practices or understandings or to share the incapacitated individual's resources may harm the individual's autonomy and welfare and discourage well-intended family members from providing guardianship services. Moreover, insistence on allowing conflicts only with *prior* authorization ignores the reality that unsophisticated family guardians often lack legal assistance until they are sued. Thus, fiduciary law can be intrusive and demoralizing if applied without flexibility to close family guardian relationships.

E. Termination

A guardian may be removed from her office if she has neglected her duties. **See Chapter 11**. Again, family guardians receive no special consideration in removal proceedings based on alleged misconduct and have been removed on grounds of abuse/neglect,⁶⁷ self-dealing,⁶⁸ and failure to report.⁶⁹ For example, an Illinois court removed a well-intended mother-guardian and long-term carer of an incapacitated adult on grounds of poor compliance with reporting and no-conflict duties.⁷⁰ But the importance to the adult of the relationship with the guardian can be considered in the decision. Thus, a close family bond can weigh against termination if the court views removal of the guardian as harmful to the adult.⁷¹

V. Family Guardians of Adults with Intellectual Disabilities

When an intellectually disabled child reaches the age of majority (usually 18), parental authority ends. The individual is assumed to be competent to function as a legal adult unless a guardianship is established. Often a parent will petition to become the guardian for the severely disabled person, to retain decision-making authority, and to obtain access to healthcare and other benefits.⁷² This form of guardianship differs from family guardianships involving elderly adults in several ways: First, it typically is initiated to allow continuation of the pre-appointment, parent-minor child relationship for an individual who is unable to function as an adult. Second, the individual typically lives with the guardian, not necessarily the case with an elderly protected adult. Third, although the individual usually has preferences and values that should guide the

⁶⁷ See, e.g., *In re Helen S.*, 13 N.Y.S.3d 516 (N.Y. App. Div. 2015).

⁶⁸ See, e.g., *In re Gladstone*, 2017 WL 1013602 (Ga. Ct. App. Mar. 14, 2017).

⁶⁹ See, e.g., *In re Estate of O'Hare*, 34 N.E.3d 1126, 1128-29 (Ill. Ct. App. 2015).

⁷⁰ *Id.*

⁷¹ Courts have considered which potential guardian has a better relationship with the ward. See, e.g., *In re Garrett YY*, 684 N.Y.S.2d 700, 702-03 (N.Y. App. Div. 1999).

⁷² Nina A. Kohn, Jeremy A. Blumenthal & Amy T. Campbell, *Supported Decision-Making: A Viable Alternative to Guardianship?*, 11 Penn. St. L. Rev. 1111, 1118-19 (2013) (citations omitted).

guardian's choices, she has a less developed interest in personal autonomy than an elderly person who has functioned independently for much of her life. Finally, typically, the intellectually disabled individual does not have a personal estate (unless she has received a tort judgment). Despite these differences, most states do not distinguish this relationship from other guardianships, nor give special weight to the parent's prior caretaking role in the appointment process.⁷³ In a few states, however, this form of guardianship is subject to a streamlined appointment process and to reduced reporting requirements. These accommodations treat guardianships involving intellectually disabled individuals as an intermediate category between the fiduciary bond between a parent and minor child and a family guardianship of a formerly-capacitated adult.⁷⁴

A. Appointment.

Although a parent of an intellectually disabled adult typically becomes the guardian, most states create no presumption in favor of appointing the parent,⁷⁵ and the appointment process is subject to the same due process requirements as are other guardianships. In New York, in contrast, a special regime that is simpler and less costly governs this form of guardianship,⁷⁶ with the express purpose of providing an efficient means to enable parents of children with intellectual disabilities to continue their caretaking and decision-making roles when their children reach majority.⁷⁷ A diagnosis by specialized healthcare professionals provides sufficient evidence of incapacity, a hearing is rarely held, and the resulting guardianship is almost always broad and indefinite.⁷⁸ Some fiduciary and reporting duties apply, but otherwise the guardianship largely continues the relationship between the parent and the minor disabled child.⁷⁹

B. Application of Fiduciary Duties.

⁷³ *In re Guardianship of Cornelius*, 326 P.3d 718 (Wash. Ct. App. 2014); *In re Tammy J.*, 270 P.3d 805 (Alaska 2012).

⁷⁴ One of these streamlined regimes has been the subject of ongoing constitutional challenges. *Disability Rights New York v. State of New York*, Case 1:16-cv-07363-AKH (S.D.N.Y. August 16, 2017) (dismissing constitutional challenges to New York's special guardianship regime for adults with intellectual disabilities). Counsel for the plaintiff has informed one of the authors that the plaintiff is appealing the dismissal.

⁷⁵ See, e.g., *In re Tammy J.*, 270 P.3d 805, 809-11 (Alaska 2012).

⁷⁶ N.Y. Surr. Ct. Proc. Act art. 17-A (McKinney 2017). The guardianship regime for most other adults is N.Y. Mental Hyg. Law art. 81 (McKinney 2017).

⁷⁷ Rose Mary Bailly & Charis B. Nick-Torok, *Should We Be Talking?—Beginning A Dialogue on Guardianship for the Developmentally Disabled in New York*, 75 Alb. L. Rev. 807, 818 (2011-12).

⁷⁸ *Revisiting S.C.P.A. 17-A: Guardianship for People with Intellectual and Developmental Disabilities*, 18 CUNY L. Rev. 287, 305 (2015).

⁷⁹ *In re Timothy R.R.*, 977 N.Y.S.2d 877, 883 (N.Y. Surr. Ct. 2013).

Family guardianships involving intellectually disabled adults generally are subject to the same fiduciary duties as other guardianships, but some states give limited recognition to the special characteristics of these guardianships. Accommodation of reporting requirements is most common, in part because intellectually disabled adults often have few assets. A few statutes dispense with the burden of annual reporting, particularly if the adult's only source of income is social security benefits.⁸⁰ Moreover, guardians may have reduced reporting duties under statutes that adjust this burden according to the size of the estate or the frequency of transactions. Under Kentucky's statute, for example, the guardian of estate is permitted to file informal biennial reports if the guardianship estate comprises a small amount of personal property and no real property.⁸¹

Courts often apply the rule against self-dealing strictly against the parent guardian, however, when an intellectually disabled adult has a substantial estate. For example, an Illinois court considered a case in which the adult had a substantial estate resulting from a medical malpractice settlement for birth injuries. She lived with her mother, who was her primary caregiver and became the guardian of her estate when she reached majority. Without prior authorization and proper record-keeping, the mother-guardian purchased a family home, using funds from the guardianship estate to pay the down payment and mortgage repayments, and paid vehicle expenses for the family car and a caregiver's salary to herself. The mother was removed as guardian notwithstanding the "excellent care" that she had provided to her daughter for her whole life. The court held the mother in breach of fiduciary duty for using funds from the guardianship estate to benefit the family as a whole, rather than her daughter separately.⁸²

This decision seems to ignore the reality that the interests of some adults with intellectual disabilities, like those of minor children, are intertwined with the interests of the parent who provides ongoing care. Parents who continue the role of caring for their disabled child may be unsophisticated about the heightened fiduciary duties they assume as guardians. Although advocates raise legitimate concerns about the threat to the disabled young adult's emerging interest in self-determination,⁸³ it is important not to ignore the value to her of life-long family bonds. Informal social norms may be powerful regulators of parents in this context and the

⁸⁰ See, e.g., Fla. Stat. § 393.12 (2016).

⁸¹ Ky. Rev. Stat. Ann. § 387.710(c) (West 2016).

⁸² *In re Estate of O'Hare*, 34 N.E.3d 1126, 1128-29, 1131 (Ill. Ct. App. 2015).

⁸³ Kohn et al., *supra* note 72, 1119-20 (describing autonomy- and antidiscrimination-based criticisms of guardianships of individuals with ID).

burdens of care are sometimes more onerous than with younger children. For these reasons, reducing the guardian's burden and enhancing relationship rewards may often benefit the adult subject to guardianship.

VI. Conclusion

The goal of family law is to encourage family members to care for one another, and particularly to induce parents to care for their children and to act in their children's interests. Surrogacy law similarly aims to induce the guardian to act to serve the interest of the protected person and not her selfish interests. In both fiduciary contexts, bonding and monitoring mechanisms function to align the interests of agent and principal. As this chapter shows, family law relies heavily on informal enforcement mechanisms in most intact families, while recognizing that affective bonds and informal social norms are sometimes ineffective, especially after family dissolution. Surrogacy law, in contrast, encourages satisfactory performance by guardians through formal monitoring mechanisms, in the form of reporting requirements, and bonding mechanisms, represented by conflict of interest rules. While this regulatory regime generally serves the interests of the adult subject to guardianship and deters self-interested behavior by her guardian, this chapter proposes that in the context of close family relationships, formal legal regulation can sometimes be applied more flexibly to the ultimate benefit of the adult.